

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Re: Enforcement Discretion for State GHG Tailoring Rule Provisions

To Whom It May Concern:

On October 15, 2014, the New York State Department of Environmental Conservation (Department) issued a letter exercising its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Parts 201 and 231 relating to the regulation of greenhouse gas (GHG) emissions (the "2014 ED Letter"). This is to advise you that, subject to the terms set forth in this letter, the Department continues to exercise its authority to utilize enforcement discretion with respect to such provisions.

As discussed in the 2014 ED Letter, the U.S. Supreme Court issued a decision in Utility Air Regulatory Group v. EPA, 124 S. Ct. 2427 (2014) ("UARG"), holding that the U.S. Environmental Protection Agency (EPA) may not treat GHGs as an air pollutant for purposes of determining whether a source is required to obtain a Prevention of Significant Deterioration (PSD) or Title V permit under the Clean Air Act. The Court also held that, for a source that is otherwise required to obtain a PSD permit based on its emissions of non-GHG pollutants, EPA could continue to require limitations on GHG emissions based on the application of Best Available Control Technology (BACT).

As anticipated by the Department in the 2014 ED Letter, following the Supreme Court's decision, subsequent legal action in the D.C. Circuit Court of Appeals and by EPA has clarified some outstanding issues. First, EPA issued additional guidance regarding its treatment of so-called "Step 2" sources (also known as "GHG-only" sources), which are those sources that were classified as "major" solely on the basis of GHG emissions.¹ Second, the D.C. Circuit Court of Appeals issued an amended judgment vacating certain PSD and Title V regulations to the extent that they require a source to obtain a PSD or Title V permit solely because the source emits or has the potential to emit GHGs above the applicable major source thresholds.² Finally,

¹ See Next Steps for Addressing EPA-Issued Step 2 Prevention of Significant Deterioration Greenhouse Gas Permits and Associated Requirements, Dec. 19, 2014, available at: https://www.epa.gov/sites/production/files/2015-12/documents/step2permitrescissionmemofinal_12-19-14.pdf, see also No Action Assurance Regarding EPA-Issued Step 2 Prevention of Significant Deterioration Permits and Related Title V Requirements Following Utility Air Regulatory Group v. Environmental Protection Agency, Dec. 19, 2014, available at: https://www.epa.gov/sites/production/files/2015-12/documents/oecanoactionassurancememo_december192014.pdf.

² Coalition for Responsible Regulation, Inc. v. EPA, Nos. 09-1322, 10-073, 10-1092 and 10-1167 (D.C. Cir. Apr. 10, 2015).



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consistent with this amended judgment, EPA removed relevant provisions of the PSD and Title V permitting regulations from the Code of Federal Regulations.³

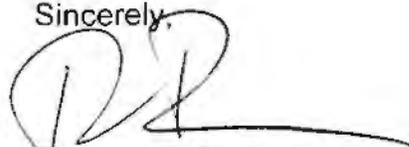
The D.C. Circuit's amended judgment also directed EPA to consider whether any further revisions to its regulations are appropriate in light of UARG. EPA therefore intends to conduct additional rulemaking action in the future. Such rulemaking will include a proposed significant emission rate (SER) for GHGs under the PSD permitting program. This pending rulemaking will likely require the Department to promulgate revisions to 6 NYCRR Parts 201 and 231, so that the Department's provisions for GHG emissions under its PSD and Title V permitting programs are consistent with and at least as stringent as those established by EPA.

Therefore, in the meantime, as set forth in the 2014 ED Letter, the Department will continue to not apply or enforce provisions of the State's PSD and Title V permitting regulations which, prior to UARG, required a source to obtain a PSD or Title V permit based solely on its GHG emissions (also known as "Step 2" or "GHG-only sources"). For any source otherwise required to obtain a PSD permit based on its emissions of non-GHG emissions (also known as a "Step 1" or "anyway" source), the Department will continue to require compliance with PSD BACT requirements for GHGs, consistent with the emission thresholds and conditions described in the 2014 ED Letter.

The Department will utilize this interim approach until the Department promulgates revisions to 6 NYCRR Parts 201 and 231 regarding the regulation of GHG emissions under its PSD and Title V permitting programs. All other provisions of 6 NYCRR Parts 201 and 231 remain in effect and will be enforced. The Department reserves the right to withdraw this grant of enforcement discretion after providing 30 days of notice in the *Environmental Notice Bulletin*.

If you have any questions about this grant of enforcement discretion, please contact Jonathan Binder, Esq. of my staff at (518) 402-9507.

Sincerely,



Thomas S. Berkman
Deputy Commissioner
and General Counsel

cc: Regional Directors
Regional Air Pollution Control Engineers
Division of Environmental Permits
R. Stanton

³ 80 FR 50199 (Aug. 19, 2015).